

Genesis Health Ventures, Inc., t/a Genesis Elder Care and Fairview Care Center of Bethlehem Pike and District 1199C, National Union of Hospital & Health Care Employees, AFSCME, AFL-CIO. Case 4-CA-27388

November 27, 1998

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

Pursuant to a charge filed on August 19, 1998, the Acting General Counsel of the National Labor Relations Board issued a complaint on September 15, 1998, alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 4-RC-19345. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer and an amended answer admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.

On October 19, 1998, the Acting General Counsel filed a Motion for Summary Judgment and Memorandum in Support. On October 21, 1998, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its response, the Respondent admits its refusal to bargain but attacks the validity of the certification on the basis of the Board's unit determination in the representation proceeding.

The Respondent affirmatively asserts that the complaint should be dismissed because the Board's decision in the underlying representation case with regard to the supervisory status of its licensed practical nurses (LPNs) is in error and contrary to the decisions of the Supreme Court in *NLRB v. Healthcare & Retirement Corp.*, 511 U.S. 571 (1994), and of the Third Circuit in *Passavant Retirement & Health Center v. NLRB*, 149 F.3d 243 (3d Cir. 1998). Specifically, the Respondent argues that the unit is inappropriate because the LPNs are supervisors within the meaning of the Act.

The representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence or allege any "special circumstances" which would provide a basis for the Board to reexamine the decision made in the representation proceeding.

In the representation case we denied review of the Acting Regional Director's Decision and Direction of Election as it raised no substantial issues warranting review. It would be contrary to our long-settled policy to allow the parties to relitigate representation case issues in "test of certification" unfair labor practice proceedings, absent newly discovered or previously unavailable evidence or special circumstances. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

Further, the Respondent's citation to a decision of the Third Circuit is selective and fails to acknowledge that the Board's position on the supervisory status of nurses has been upheld by the Eighth, Ninth, and District of Columbia Circuits. *Lynwood Health Care Center v. NLRB*, 148 F.3d 1042 (8th Cir. 1998), enfg. 323 NLRB No. 200 (July 3, 1997) (not reported in Board volumes); *Grandview Health Care Center v. NLRB*, 129 F.3d 1269 (D.C. Cir. 1997), enfg. 322 NLRB No. 54 (Oct. 15, 1996) (not reported in Board volumes); and *Providence Alaska Medical Center v. NLRB*, 121 F.3d 548 (9th Cir. 1997), enfg. 321 NLRB No. 100 (July 10, 1996) (not reported in Board volumes).

Moreover, in *Passavant Retirement & Health Center v. NLRB*, the Third Circuit specifically stated it was "not creating a per se rule that LPNs are supervisors." 149 F.3d at 249. Indeed, each case must be decided on its own facts. The Acting Regional Director considered the entire factual record and the Respondent's assertions concerning that record, and concluded that the LPNs are not supervisors. In doing so, he specifically found that LPNs do not exercise independent judgment in making work assignments to the certified nursing assistants (CNAs). In addition, the evidence presented in the underlying representation case with respect to the involvement of LPNs in the discipline and the evaluation of CNAs fell short of establishing that the LPNs make effective recommendations concerning either of these Section 2(11) indicia. Significantly, in the disciplinary matters relied upon by the Respondent, it was predominantly the House Supervisor, not the LPN, who made the recommendations. Finally, the Acting Regional Director noted that the Director of Nursing testified that the evaluations are not used for promotions, raises and disciplinary purposes. Accordingly, we grant the Motion for Summary Judgment.¹

On the entire record, the Board makes the following

¹ Member Hurtgen did not participate in the underlying representation case. He does not necessarily agree with it. However, he agrees that the Respondent does not raise any new factual matters, and thus summary judgment is appropriate. Similarly, although there are court decisions which may well be inconsistent with the legal conclusion reached in the representation case, Member Hurtgen agrees, for institutional reasons, not to challenge that representation case in this certification-testing 8(a)(5) case. See *Pittsburgh Plate Glass*, supra. Finally, and for the same reasons, Member Hurtgen does not pass on the effort here to further support the conclusion reached in the representation case.

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Pennsylvania corporation with a principal place of business in Kennett Square, Pennsylvania, has been engaged in the ownership, management, and operation of nursing homes and related health care ventures, including the operation, ownership, and management of the nursing home involved here, Fairview Care Center of Bethlehem Pike (the facility).

During the 12-month period preceding issuance of the complaint, the Respondent, in conducting its business operations, received gross revenues in excess of \$250,000 and purchased and received at the facility goods valued in excess of \$50,000 directly from points outside the Commonwealth of Pennsylvania. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act. We further find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the election held April 23, 1998, the Union was certified on May 4, 1998, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time Licensed Practical Nurses, including regular part-time pool Licensed Practical Nurses, but excluding all other employees, Registered Nurses, professional employees, clerical employees, guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. *Refusal to Bargain*

On about July 17, 1998, by letter, the Union has requested the Respondent to recognize and bargain, and since on or about that date the Respondent has failed and refused. We find that this failure and refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing on and after July 17, 1998, to recognize and bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Genesis Health Ventures, Inc., t/a Genesis Elder Care and Fairview Care Center of Bethlehem Pike, Kennett Square, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain with District 1199C, National Union of Hospital & Health Care Employees, AFSCME, AFL-CIO as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, recognize and bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time Licensed Practical Nurses, including regular part-time pool Licensed Practical Nurses, but excluding all other employees, Registered Nurses, professional employees, clerical employees, guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Kennett Square, Pennsylvania, copies of the attached notice marked "Appendix."² Copies of the notice, on forms provided by the Regional Director for Region 4 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and

² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 17, 1998.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with District 1199C, National Union of Hospital & Health Care Employees, AFSCME, AFL-CIO as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All full-time and regular part-time Licensed Practical Nurses, including regular part-time pool Licensed Practical Nurses, but excluding all other employees, Registered Nurses, professional employees, clerical employees, guards and supervisors as defined in the Act.

GENESIS HEALTH VENTURES, INC., T/A
GENESIS ELDER CARE AND FAIRVIEW CARE
CENTER OF BETHLEHEM PIKE